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In The

Supreme Court of the United States

October Term, 1994

CITY OF DEARBORN,

Petitioner,

vs.

RONALD LOSCHIAVO and
DONNA LOSCHIAVO, his wife,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESTATED QUESTIONS PRESENTED

I.

WHETHER THE COURT OF APPEALS CONCLUSION THAT A PRIVATE RIGHT OF ACTION EXISTS UNDER 42 U.S.C. §1983 TO ENFORCE RIGHTS UNDER FCC REGULATION, 47 C.F.R. §25.104 CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *JOHNSON v. CITY OF PLEASANTON*, 982 F.2d 350 (9th Cir. 1992)?

II.

WHETHER THE COURT OF APPEALS CONCLUSION THAT FCC REGULATION, 47 C.F.R. §25.104 CREATES AN ENFORCEABLE RIGHT UNDER 42 U.S.C. §1983 IS ERRONEOUS?

III.

WHETHER THE COURT OF APPEALS ERRED IN STATING THAT REASONABLENESS IS EASILY SUSCEPTIBLE OF JUDICIAL EVALUATION AND WHETHER IT MADE PROPER EVALUATION OF THE REASONABLENESS OF DEARBORN'S ORDINANCE?

RESTATED QUESTIONS PRESENTED – Continued

IV.

WHETHER THE NINTH CIRCUIT'S ANALYSIS IN *HOWARD v. BURLINGAME*, 937 F.2d 1376 (9th Cir. 1991) OF THE FCC REGULATION APPLICABLE TO AMATEUR RADIO ANTENNAS, APPLIES TO AND CONTROLS DISPOSITION OF RESPONDENTS' 42 U.S.C. §1983 CLAIMS FOR ENFORCEMENT OF THEIR RIGHTS UNDER 47 C.F.R. §25.104 CONCERNING SATELLITE RECEPTION ANTENNAS?

V.

WHETHER THIS CASE IS A LAND USE DISPUTE WHICH SHOULD BE LITIGATED IN THE STATE COURT?

VI.

WHETHER THE DECISION OF THE COURT OF APPEALS HAS RADICALLY ENLARGED THE SCOPE OF 42 U.S.C. §1983?

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OPINIONS BELOW

Respondents rely upon Petitioner's Statement.

JURISDICTION

Respondents rely upon Petitioner's Statement.

RESTATED FEDERAL AND STATE STATUTES INVOLVED

This Petition involves 42 U.S.C. §1983, 42 U.S.C. §1988, 47 U.S.C. §605 and 47 C.F.R. §25.104 which are reproduced in Petitioner's Appendix F. The Dearborn Zoning Ordinance No. 81-33, §501-e is also involved and reproduced in Petitioner's Appendix F. Lastly, this Petition involves the FCC Report and Order, *In the matter of Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations,* 51 Fed. Reg. 5519 (1986). ("Report and Order") The Report and Order is reproduced in Respondents' Appendix I.

Respondents exclude the Michigan Compiled Laws cited by Petitioner for the reason that Petitioner has neither argued nor relied upon the applicability of the state statutes to any issues which were summarily decided or tried at the District Court level or reviewed on appeal by the Sixth Circuit.

RESTATED STATEMENT OF THE CASE

On October 13, 1990, a satellite reception antenna was erected in the rear yard of the Loschiavos' home in Dearborn, Michigan. The antenna is ten feet in diameter

and is mounted on a 20 foot mast. (J.A. 57-58) Three days after the installation of the receive-only satellite antenna, a notice of violation was issued to the Loschiavos by the City for failing to comply with Dearborn Zoning Ordinance No. 81-33, §501-e, et seq. (*Loschiavo* District Court Opinion (3/17/92), Petitioner's Appendix E-2) The ordinance requires that anyone installing a receive-only satellite dish antenna which exceeds three feet in diameter must obtain approval from the Dearborn Zoning Board of Appeals. The ordinance prohibits satellite reception antennas in excess of eight feet in diameter and provides that no part of the antenna may extend higher than twelve feet above grade. The Ordinance does permit the Zoning Board of Appeals to authorize additional uses if they are "in harmony with the character of the district." No guidelines or parameters however are specified in the Ordinance. (Petitioner's Appendix F-21)

The Loschiavos applied to the Dearborn Zoning Board of Appeals for a variance to exceed the size and height limitations of the ordinance. Following a hearing on November 28, 1990, the Loschiavos' application was denied and the Zoning Board of Appeals ordered the removal of the antenna. (*Loschiavo* District Court Opinion (3/17/92), Petitioner's Appendix E-2)

Following the Dearborn Zoning Board's denial of the Loschiavos' application for variance, a Complaint was filed in the United States District Court for the Eastern District of Michigan. The Complaint alleged violation of the Loschiavos' rights under the First and Fourteenth Amendments, violation of their rights under 42 U.S.C. §1983 and sought a declaratory judgment that the Dearborn Zoning Ordinance was preempted by 47 C.F.R. §25.104. The Ordinance was preempted because it differentiated between satellite receive-only antennas and

other types of antennas, and did not redeem itself under the two prong test set forth in the FCC Regulation. Such test required that 1) the ordinance have a clearly defined health, safety and aesthetic objective, *and* 2) that it does not impose unreasonable limitations on, or prevent reception of, satellite delivered signals or impose costs on users of such antennas that are excessive in light of the purchase and installation cost of the equipment. 47 C.F.R. §25.104. The relief sought by the Loschiavos included a declaratory judgment that the Ordinance was preempted, a permanent injunction, money damages, attorney fees and other relief deemed appropriate by the Court.

The District Court had subject matter jurisdiction over the Loschiavos' claims pursuant to 28 U.S.C. §1331 as federal questions were raised under 47 U.S.C. §605 and 47 C.F.R. §25.104, as well as the First and Fourteenth Amendment claims. With regard to the 42 U.S.C. §1983 claim, the District Court had subject matter jurisdiction pursuant to 28 U.S.C. §1343(a)(3).

On January 9, 1992, the District Court conducted a hearing on the parties' Cross-Motions for Summary Judgment. The District Court granted in part Dearborn's motion dismissing the First and Fourteenth Amendment counts and the claim under 42 U.S.C. §1983. The Court held there was no private right of action under the Civil Rights Act for violation of the FCC satellite reception antenna preemption regulation. (Petitioner's Appendix C-13, 14) The Loschiavos' Motion for Summary Judgment was denied and the matter preceded to trial on the preemption issue in February, 1992.

The District after trial found in a Memorandum Opinion and Judgment that the Ordinance was preempted. The Court acknowledge the Ordinance had a

reasonable and clearly defined health, safety and aesthetic objective, but found that the Ordinance unreasonably restricted satellite signal reception in violation of the second prong of the FCC Regulation. The Court found the Ordinance unreasonably restricted reception, in part, because it did not contain any express provisions for flexibility for property where the satellite sight lines are blocked, as was the case with the Loschiavos. The District Court then specifically held that the provision allowing additional uses which were "in harmony with the character of the district" was inadequate because it balanced aesthetic concerns with the right to reception. Such balancing of the FCC intent with aesthetic concerns could not be performed as the Court was bound by the legislative intent of the FCC to forbid unreasonable restrictions upon reception. (Petitioner's Appendix E-5) A permanent injunction against enforcement of the preemption Ordinance was entered.

The Loschiavos appealed from the Summary Judgment dismissal of their 42 U.S.C. §1983 claim. A Cross-Appeal was filed by Dearborn on the preemption issue.

The Sixth Circuit Court of Appeals reversed the District Court on the 42 U.S.C. §1983 claim, holding that such a private right of action was available to the Loschiavos under 42 U.S.C. §1983 to enforce their right to a satellite reception antenna.

The Court of Appeals affirmed the injunctive relief granted to the Loschiavos prohibiting enforcement of the preempted Dearborn Ordinance. (Petitioner's Appendix A-9)

Dearborn filed a Petition for Rehearing *En Banc* on September 21, 1994. The Loschiavos were requested to file a Response to the Petition. None of the active Judges of the Sixth Circuit requested a poll on the suggestion for

Rehearing *En Banc*. The Petition was then referred to the original hearing panel and was denied on November 22, 1994. (Petitioner's Appendix B)

Dearborn filed its Petition for a *Writ of Certiorari* with this Court on December 12, 1994.

ARGUMENT

I.

THE COURT OF APPEALS CONCLUSION THAT A PRIVATE RIGHT OF ACTION EXISTS UNDER 42 U.S.C. §1983 TO ENFORCE RIGHTS UNDER FCC REGULATION, 47 C.F.R. §25.104 IS NOT IN CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *JOHNSON v. CITY OF PLEASANTON*, 982 F.2d 350 (9th Cir. 1992).

The District Court after a bench trial held that the Dearborn Ordinance was preempted by 47 C.F.R. §25.104. However, it had previously granted Dearborn's Motion for Summary Judgment dismissing the Loschiavos' claim under 42 U.S.C. §1983. The District Court followed the Northern District of California decision in *Johnson v. City of Pleasanton*, 781 F. Supp. 632 (N.D. Cal. 1991). The Court of Appeals for the Sixth Circuit in the instant case after an independent analysis of the 42 U.S.C. §1983 issue reversed the District Court and held there is a private right of action under 42 U.S.C. §1983 to enforce rights to have a satellite reception antenna as set forth in 47 C.F.R. §25.104.

Dearborn argues that the Sixth Circuit Opinion on the 42 U.S.C. §1983 claim created a split of authority between the Sixth Circuit and Ninth Circuit. Dearborn contends the Northern District of California holding was

affirmed by the Ninth Circuit. *Johnson v. City of Pleasanton*, 982 F.2d 350 (9th Cir. 1992). This assertion is untrue.

Analysis of the *Johnson* cases must begin with the Northern District of California Opinion. The Northern District of California granted the City of Pleasanton's Motion for Summary Judgment dismissing the Plaintiff's First and Fourteenth Amendment claims and the 42 U.S.C. §1983 claim. The Northern District of California also granted the Johnson's Cross-Motion for Summary Judgment on the FCC preemption issue.

The case then proceeded to the Ninth Circuit Court of Appeals where the preempted issue and the First and Fourteenth Amendment issues were briefed by the parties and decided by the Ninth Circuit. The 42 U.S.C. §1983 issue was neither briefed by the parties nor discussed or decided by the Ninth Circuit. See *Johnson v. City of Pleasanton*, 982 F.2d 350 (9th Cir. 1992). The case was remanded to the Northern District of California for trial on the preemption issue. Upon this writer's information and belief, the matter was ultimately settled by the parties and the action has been voluntarily dismissed. There have been no further proceedings in *Johnson* involving the 42 U.S.C. §1983 issue. Accordingly, there is no split of authority between the *Johnson* Ninth Circuit Opinion and the *Loschiavo* Sixth Circuit Opinion on the issue of whether there is a private right of action to enforce rights under 47 C.F.R. §25.104.

II.

THE COURT OF APPEALS CONCLUSION THAT FCC REGULATION, 47 C.F.R. §25.104 CREATES AN ENFORCEABLE RIGHT UNDER 42 U.S.C. §1983 IS NOT ERRONEOUS.

Dearborn argues that no enforceable right exists under 47 C.F.R. §25.104 for the Loschiavos to support a 42

U.S.C. §1983 action. The Loschiavos disagree. The proper test under which to conduct the analysis required to resolve the disagreement is found in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990) as follows:

> [1] Did congress intend that the subject provision benefit the Plaintiff;
>
> [2] If so, does the provision create a binding obligation on a governmental unit rather than merely "congressional preference"; and
>
> [3] Is the interest asserted sufficiently clear that it may be judicially enforced. (*Quoting Golden State Transit v. Los Angeles*, 493 U.S. 103, 106 (1989)).

Wilder, 496 U.S. at 509.

The test set forth in *Cort v. Ash*, 422 U.S. 66 (1975) mentioned by Dearborn in its Petition and reviewed by the *Johnson* District Court was not the proper test for review of a private right of action under 47 U.S.C. §605, as the right asserted is an express right of private action. *Wilder*, 496 U.S. at 508 clearly indicates that the *Wilder* test is to be used in an instance of express rights while the *Cort* test is appropriate only in implied rights of actions.

The *Johnson* District Court properly held that the key in determining whether a statute or regulation creates rights enforceable under 42 U.S.C. §1983 is the legislative intent. *Johnson*, 781 F. Supp. at 644, citing *Wright v. Roanoke Development and Housing Authority*, 479 U.S. 431 (1987). However, the *Johnson* District Court finding that the Report and Order was a mere congressional preference was erroneous and unsupported. Contrary to the intentions of Dearborn and the *Johnson* District Court Opinion, the Sixth Circuit Court of Appeals in the instant action properly held:

> [w]e also find there is sufficient mandatory language in the FCC's regulation to create a binding obligation on the City of Dearborn. In unequivocal terms, Section 25.104 provides that local regulations such as Dearborn Ordinance No. 81-33, §501-e 'are preempted' if they unduly limit satellite reception or impose excessive costs on satellite antenna users.

Loschiavo v. City of Dearborn, 33 F.3d-548, 552 (6th Cir. 1994). (Petitioner's Appendix A-7)

The Sixth Circuit Court of Appeals also characterized the language of §25.104 as "a clear command" and "unambiguous in nature". *Loschiavo*, 33 F.3d at 552. (Petitioner's Appendix A-7)

The Report and Order provides for a mandatory preemption. The District Court in *Johnson v. City of Pleasanton*, 781 F.Supp. 632 (N.D. Cal. 1991) fails to explain how such a mandatory preemption could be considered a "mere preference." It is obvious from a reading of the rule adopted that it is mandatory. The FCC in its Report and Order states:

> State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities *are preempted* unless such regulations
>
> (a) Have a reasonable and clearly defined health, safety or aesthetic objective; and
>
> (b) Do not operate to impose unreasonable limitations on or prevent reception of satellite delivered signals by receive-only antennas or to impose costs on users of such antennas that are excessive in light of the purchase and installation cost of the equipment. (Emphasis added)

Preemption of Local Zoning, 51 Fed. Reg. 5519, 5520, ¶ 1 (1986). (Respondents' Appendix 3A)

It is clear that if a local ordinance differentiates between satellite reception antennas and other types of antenna facilities, it is preempted, the burden then shifts to the municipality to prove the ordinance has a reasonable and clearly defined health, safety or aesthetic objective, *and* does not impose unreasonable limitations on reception or unreasonable cost. In the meantime, the ordinance, however, is mandatorily preempted.

The FCC in its Report and Order states:

> Whether a judicial remedy might be available in some cases and to those who can afford litigation is not determinative of our ability or of the necessity to preempt state regulations when they are obstructing federal objectives.

Preemption of Local Zoning, 51 Fed. Reg. at 5523, ¶ 29. (Respondents' Appendix 19A)

Furthermore, the FCC says:

> Satellite antenna users who are dissatisfied with the results of any local zoning decision can use the standards adopted here in pursuing any legal remedies they might have. In addition, we would entertain requests for further action if it appears that local authorities are generally failing to abide by our standards. (Footnotes omitted)

Preemption of Local Zoning, 51 Fed. Reg. at 5524, ¶ 40. (Respondents' Appendix 26A-27A)

The FCC refers to its purpose as being a protection for a right and for the furtherance of congressional purpose. Paragraph 24 of the FCC Report and Order states:

> As stated in our *Notice*, when 'state regulation stands as an obstacle to the accomplishment of a congressional purpose,' such regulation is subject to preemption. Our conclusion was that the records showed local and state regulatory interference with the established federal objectives and thus some of [sic] preemption was warranted. (Footnotes omitted)

Preemption of Local Zoning, 51 Fed. Reg. at 5522, ¶ 24. (Respondents' Appendix 15A)

Further, the FCC Report and Order provides in part:

> If individuals cannot use antennas to receive satellite delivered signals because of discrimination or excessive state and local regulation, their right of access as established by section 705 (sic) [§605] to interstate communications delivered by satellite will be useless. (Footnote omitted)

Id., at ¶ 26. (Respondents' Appendix 17A)

Dearborn argues that because the regulation provides for municipalities to address health, safety and aesthetic concerns, the mandatory preemption is somehow turned into a mere preference. This is a mischaracterization of what the Report and Order provides. It permits municipalities to address these concerns, however, where the concerns result in regulations that unreasonably restrict reception or impose excessive costs, they must give way. The FCC clearly recognizes the distinct technologies associated with satellite dishes in allowing communities certain limited flexibility with respect to their ordinances. The Report and Order was designed to severely limit local interference with the use of dishes and left only narrow and limited regulatory power where local authorities have previously assumed complete and unfettered power to prohibit satellite antenna installations.

These objectives and intent to create rights enforceable by homeowners are directly addressed in Paragraphs 33 and 34 of the Report and Order.

> *If a community chooses to enact an ordinance which differentiates in its treatment of different types of antennas, it must bear a high burden.* Our objective is to insure that satellite receiving antennas are not treated less favorably than other antenna devices such as Amateur Radio antennas and Satellite Master Antenna Systems (SMATV's). *A*

> *community must demonstrate that its regulation meets both paragraph (a) and (b) of our rule.*
>
> . . .
>
> We have retained the use of health, safety and aesthetic objectives but have merely required these to be 'reasonable' and 'clearly defined.' These terms are readily susceptible to application by local authorities and gives some flexibility in the application of local regulations to individual locations. To be more specific in a general national policy statement would be inadvisable. *In addition, requiring local authorities to justify a differentiation in treatment will help insure that local zoning power is not used to restrict unreasonably the installation of satellite receive-only antennas.* (Emphasis added) (Footnotes omitted)

Preemption of Local Zoning, 51 Fed. Reg. at 5523-5524, ¶¶ 33 and 34. (Respondents' Appendix 22A-23A)

As is clear from the foregoing references, the language of the FCC Report and Order itself is the best evidence that it is designed to create a federal right in homeowners and not to just set forth a mere congressional preference.

Numerous cases from jurisdictions nationwide where satellite reception antenna ordinances have been preempted have awarded Plaintiffs attorney fees pursuant to 42 U.S.C. §§1983 and 1988. These cases include *Alsar Technologies, Inc. v. Zoning Board of Adjustment*, 235 N.J. Super. 471, 563 A.2d 83 (N.J., Super. L 1989); *Cawley v. City of Port Jervis*, 753 F. Supp. 128 (S.D.N.Y. 1990); *Van Meter v. Township of Maplewood*, 696 F. Supp. 1024 (D.N.J. 1988); *Village of Elmgrove v. Py*, 724 F. Supp. 612 (E.D. Wis. 1989); and *Ermler v. Town of Brookhaven*, 795 F. Supp. 85 (E.D.N.Y. 1992). However, although these cases award attorney fees, and thus presumptively find that a private right of action exists, none of these cases analyze in depth

the applicability of 42 U.S.C. §1983 to Plaintiffs' claim that zoning ordinances violate and are therefore preempted by the Report and Order.

Other than the cases cited above, the only two Opinions that this writer has been able to find which have ruled on *and* analyzed the applicability of 42 U.S.C. §1983 to Plaintiffs' claims are *Johnson v. City of Pleasanton*, 781 F. Supp. 632 (N.D. Cal. 1991) and *Kessler, et al. v. Town of Niskayuna*, case no. 91-CV-104; 91-CV-464 (N.D.N.Y. 12/26/91). *Johnson*, contrary to all of the prior cases cited above held that there was no 42 U.S.C. §1983 cause of action arising from a municipality violating the Preemption Order. *Kessler*, consistent with the prior Opinions held that such a cause of action is permissible.

The Court of Appeals for the Sixth Circuit properly stated the following regarding §1983 actions:

> Section 1983 creates a cause of action against any person who, under the color of state law, abridges 'rights, privileges, or immunities secured by the Constitution and the laws' of the United States. 42 U.S.C. §1983. In *Maine v. Thiboutot*, 448 U.S. 1, 6-8, 100 S. Ct. 2502, 2505-06, 64 L.Ed.2d 555 (1980), the Supreme Court recognized that plaintiffs may use Section 1983 to enforce not only constitutional rights, but also those rights defined by federal statutes. As federal regulations have the force of law, they likewise may create enforceable rights. *Wright*, 479 U.S. at 431, 107 S. Ct. at 774. Section 1983 is not available, however, "to enforce a violation of the federal statute 'where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of §1983.' " *Suter v. Artist M.*, ___ U.S. ___, ___, 112 S. Ct.

> 1360, 1366, 118 L.Ed.2d 1 (1992) (quoting *Wright*, 479 U.S. at 423, 107 S. Ct. at 770).
>
> *Loschiavo*, 33 F.3d at 551. (Petitioner's Appendix A-4)

Dearborn suggests that the Court of Appeals erred in not applying *Suter's* facts to the case at hand. Dearborn claims that the unreasonable limitations at issue in the FCC Report and Order can be likened to the reasonable efforts at issue in *Suter*. Such is not the case as the regulation at issue in *Suter* is very different from the regulation involved in the instant action. This Court determined that the ultimate inquiry in *Suter* was:

> Did Congress in enacting the Adoption Act, unambiguously confer upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family? We now turn to that inquiry.
>
> *Suter*, 112 S. Ct. at 1367.

This Court determined that the Adoption Act at issue did not provide a right enforceable by individuals. Rather, the provisions which were mandatory as to the states could be enforced only by the Secretary for Health and Human Services. This determination was reached by this Court after careful examination of the reasonable efforts language in the context of the entire Act.

On the other hand, the FCC Report and Order at issue mandatorily preempts an ordinance that differentiates between satellite receive-only antennas and other types of antennas. Furthermore, a private right of action is expressly afforded to homeowners to enforce the rights not to have their use of satellite antennas unduly restricted. Report and Order, 51 Fed. Reg. at 5523, 5524. If a municipality's Ordinance is found to differentiate then it is preempted. However, the Ordinance may be revived

if the City establishes that it meets both prongs of the two prong test set forth in the Report and Order. To accomplish this, the municipality's regulation must first have a reasonable and clearly defined health, safety and aesthetic objective. Then the second prong prevents these objectives from being met by imposing unreasonable restrictions on reception or imposing unreasonable costs. The two prong test does not affect the enforceability of the federal right to receive satellite signals which is expressly afforded to homeowners in the Report and Order.

The Court of Appeals for the Sixth Circuit did not err in its analysis of the availability of the private right of action under 42 U.S.C. §1983 and the *Loschiavo* Opinion from the Sixth Circuit does not conflict with this Court's Opinion in *Suter* for the above stated reasons.

III.

THE COURT OF APPEALS DID NOT ERR IN STATING THAT REASONABLENESS IS EASILY SUSCEPTIBLE OF JUDICIAL EVALUATION AND IT MADE PROPER EVALUATION OF THE REASONABLENESS OF DEARBORN'S ORDINANCE.

Petitioners argue that the Court of Appeals for the Sixth Circuit should have evaluated the reasonableness of Dearborn's ordinance before holding it did operate to impose unreasonable limitations on or prevent reception of satellite delivered signals. The argument presented by Petitioner evidences the fact that it does not understand the operation of the FCC Preemption Report and Order.

The District Court in the instant action clearly understood how the Report and Order is to be applied. The *Loschiavo* District Court stated as follows:

> As a threshold issue, then, the regulation will pre-empt an ordinance only if it differentiates between satellite receive-only antenna and other types of antenna facilities. Once such differentiation is shown, then the ordinance survives only by meeting both prongs (a) and (b) above. In denying defendant's motion for summary judgment on this issue, the Court found that the threshold was met, making it necessary to consider both parts of the test. The Court also found that the ordinance has a reasonable and clearly defined health, safety or aesthetic objective, sufficient to meet the first part of the test. However, the Court found that a question of fact remained as to whether the second prong was met. The trial focused on this question.
>
> (Petitioner's Appendix E-3)

The *Loschiavo* District Court after discussing the specific testimony upon which its holding relied, stated as follows:

> Subsection (b) of the regulation can be broken down into three parts: 1) an ordinance may not impose unreasonable restrictions on reception; 2) an ordinance may not prevent reception; and 3) an ordinance may not impose excessive costs upon users.
>
> (Petitioner's Appendix E-3-4)

The *Loschiavo* District Court then set forth the testimony upon which its holding relied and then stated as follows:

> Based upon this testimony, the Court finds that the ordinance unreasonably restricts reception in violation of the FCC regulation because it contains no express provisions for variances for dishes on property where satellite site lines are blocked. The provision allowing additional uses where they are 'in harmony with the character of the district' is inadequate because it balances

> aesthetic concerns with the right to reception. While the city's aesthetic concerns are legitimate and plaintiffs' satellite dish definitely could be considered aesthetically displeasing, this court is bound by the legislative intent of the FCC to forbid unreasonable restrictions on reception. The court cannot balance this intent with aesthetic concerns. The regulation absolutely entitles plaintiffs to be free of unreasonable restrictions on reception. Although the ordinance may be valid as to properties on the south side of the city, where site lines to satellites are direct, nowhere on plaintiffs' property could they erect a dish in compliance with the ordinance and receive reasonable reception. Therefore, the ordinance is pre-empted by the regulation and is unenforceable, as applied to this case and generally, unless the city makes provisions to accommodate situations where surrounding structures make it impossible to erect a dish that complies with the ordinance and receives reasonable reception.
>
> (Petitioner's Appendix E-5)

The Court of Appeals for the Sixth Circuit affirmed the reasonableness issues as addressed by the District Court. As such, Dearborn's contention that it "remains an unanswered question of law whether Dearborn's ordinance violates this regulation" (Petition for *Writ of Certiorari*, at p. 11) was clearly decided by the District Court and affirmed by the Court of Appeals.

The Court of Appeals for the Sixth Circuit made the following findings with regard to the reasonableness issue raised by the FCC Report and Order:

> A regulation is not rendered impermissibly vague simply because it calls for a judicial determination of 'reasonableness.' See *Wilder*, 496 U.S. at 520; 110 S. Ct. at 2523. (inquiry into

> reasonableness of Medicaid reimbursement rates is 'well within the competence of the judiciary'); *Wright*, 479 U.S. at 432, 107 S. Ct. at 774 (interpreting 'reasonable' utility allowance). Instead, as the Supreme Court has recognized, Courts are competent to interpret each statute or regulation by its own terms, considering the provision 'in light of the entire legislative enactment.' *Suter*, ___ U.S. at ___ & n. 8, 112 S. Ct. at 1367 & n. 8. Here, the legislative history of the 1984 Act makes clear that Congress amended Section 605(b) of the Communications Act to promote individual access to diverse satellite programming. To further this goal, the FCC adopted Section 25.104, which provides unambiguous notice to local governments that zoning ordinances cannot frustrate the reception of satellite signals for home viewing. Given the straightforward nature of this provision, particularly when considered in light of the purpose of the 1984 Act, we are confident that the reasonableness standard is readily susceptible of judicial evaluation. See also *Preemption of Local Zoning*, 51 Fed. Reg. at 5524 (FCC considers it 'within the ability of the Court to make legal determinations of reasonableness or excessiveness')

Loschiavo, 33 F.3d at 552-553. (Petitioner's Appendix A-8-9)

Certainly the Courts in other satellite reception antenna cases have been able to address and decide the reasonableness issue. See *Village of Elm Grove v. Py*, 724 F. Supp. 612 (E.D. Wis. 1989); *Alsar Technology v. Zoning Board of Adjustment*, 235 N.J. Super. 471, 563 A.2d 83 (N.J. Super L. 1989); *Cawley v. City of Port Jervis*, 753 F. Supp. 128 (1990); *Kessler v. Town of Niskayuna*, 774 F. Supp. 711

(N.D.N.Y. 1991); and *Van Meter v. Township of Maplewood*, 696 F. Supp. 1024 (D.N.J. 1988).

Petitioner next suggests that the test for reasonableness with regard to Dearborn's Ordinance No. 81-33, §501(e) should not be whether it is unreasonable for a particular individual, but whether it is unreasonable generally. In support of this argument, Petitioner cites *Pennell v. City of San Jose*, 485 U.S. 1 (1988). Initially, a *Pennell* type test does not apply in the instant action, as the FCC Report and Order itself provides each individual with the unfettered right to receive satellite signals. This intent of the FCC and the right thereby created could not possibly function under the test which Petitioners claim *Pennell* sets forth.

Furthermore, *Pennell* is inapplicable to the instant action. *Pennell* examines a rent control ordinance under the takings clause. The issue involved is a rent control ordinance which allowed a reasonableness analysis with regard to the hardship of the tenant. The argument was that this reasonableness analysis amounted to a taking in a case where rent determined under objective factors was lowered after the reasonableness analysis. This Court in *Pennell* held that the taking issue was premature. *Pennell*, 485 U.S. at 9. Furthermore, under the equal protection and due process arguments presented, this Court examined those arguments in terms of "carefully considering both the individual circumstances of the landlord and tenant." *Pennell*, 485 U.S. at 13-14. *Pennell* does not say what Dearborn purports. There is no conflict between *Pennell* and the Opinion of the Sixth Circuit Court of Appeals in *Loschiavo*.

A close review of the District Court holding establishes that the Court did take both a specific view of the

Loschiavo situation and a global view of how the Ordinance dealt with varying site line situations throughout the City. The District Court noted: "[T]he Ordinance contains no express provisions for variances where houses, garages, trees, fences, etc. block the sight lines necessary for satellite transmission." (Petitioner's Appendix E-4)

In other words, the Ordinance was inflexible to the needs of satellite signal reception and set forth no guidelines for the Zoning Board to allow height and location variances from the literal terms of the Ordinance. For that reason that the Dearborn Ordinance was unreasonable *generally* and Petitioner's argument is therefore without merit.

IV.

THE NINTH CIRCUIT'S ANALYSIS IN *HOWARD v. BURLINGAME*, 937 F.2d 1376 (9th Cir. 1991) OF THE FCC REGULATION APPLICABLE TO AMATEUR RADIO ANTENNAS, DOES NOT APPLY TO OR CONTROL DISPOSITION OF RESPONDENTS 42 U.S.C. §1983 CLAIMS FOR ENFORCEMENT OF THEIR RIGHTS UNDER 47 C.F.R. §25.104 CONCERNING SATELLITE RECEPTION ANTENNAS.

Contrary to Dearborn's contention, it is not foreseeable that the decision in the *Loschiavo* case will impact upon local regulation of amateur radio antennas. Amateur radio antennas are dealt with by the FCC under a separate federal regulation designated as PRB-1, which is reproduced in Petitioner's Appendix G.

In fact, the quote at PRB-1 at p. 12 of the Petition evidences the fact that the preemption under PRB-1 is limited and leaves total discretion to localities as opposed to the mandatory preemption set forth under the Report and Order dealing with satellite reception antennas.

Dearborn makes gratuitous statements regarding the comparability of PRB-1 to 47 C.F.R. §25.104, stating that there is "really no difference between the preemption set forth in PRB-1 and the preemption set forth in 47 C.F.R. §25.104." (Petitioner's *Writ of Certiorari* at p. 13) A fair reading of both regulations belies Dearborn's interpretation. Dearborn relies on *Howard v. City of Burlingame*, 937 F.2d 1376 (9th Cir. 1991) as the cornerstone of its argument.

The Court of Appeals for the Sixth Circuit in the instant case properly distinguished *Howard v. City of Burlingame* as follows:

> We also find that there is sufficient mandatory language in the FCC's regulation to create a binding obligation on the City of Dearborn. In unequivocal terms, Section 25.104 provides that local regulations such as Dearborn Zoning Ordinance No. 81-33, §501-e 'are preempted' if they unduly limit satellite reception or impose excessive costs on satellite antenna users. 47 C.F.R. §25.104. While acknowledging that local governments have traditionally maintained a strong interest in zoning matters, the regulation explicitly preempts all zoning ordinances that improperly trammel on individual's right to satellite reception. *Id.*; compare *Howard v. City of Burlingame*, 937 F.2d 1376, 1380 (9th Cir. 1991) (recognizing that FCC declaratory ruling PRB-1 refused to preempt local regulations, requiring instead only a 'reasonable accommodation' between the antenna height desired by the amateur radio operators and 'the legitimate interests of the local governments in regulating local zoning matters').

Loschiavo, 33 F.3d at 552. (Petitioner's Appendix A-7)

Contrary to Dearborn's contentions, the Court of Appeals for the Ninth Circuit described the provisions of PRB-1 as follows: "The language of PRB-1 itself confers only in limited federal preemption, and promotes the federal interest in amateur radio operations rather than an individual operator's right to erect the antenna of his or her choice". *Howard*, 937 F.2d at 1380. The Court in *Howard* also noted the following: "The text of the Federal Communications Act nowhere mentions any right to erect antennas for ham radio transmissions, nor does it purport to create binding obligations on local governments to allow antennas of any particular height." *Howard*, 937 F.2d at 1379.

Clearly, the Court of Appeals for the Sixth Circuit properly distinguished *Howard* and PRB-1 on the basis that they were not comparable to the mandatory preemption as set forth in 47 C.F.R. §25.104.

V.

THIS CASE IS NOT A LAND USE DISPUTE WHICH SHOULD BE LITIGATED IN THE STATE COURT.

Dearborn in its fourth argument suggests that this case should not have been litigated in the Federal Courts. This argument chooses to ignore that many cases regarding this very same issue have been litigated in the Federal Courts. Furthermore, they have been properly litigated in the Federal Courts under federal question subject matter jurisdiction. Plaintiffs are not required to exhaust other remedies prior to bringing a cause of action under §1983. *Cawley v. City of Port Jervis*, 753 F. Supp. 128, 131 (1990) (Citing *Patsy v. Board of Regents*, 457 U.S. 496 (1982)). The *Cawley* Court also states: "Any person whose rights under FCC regulations have been denied by a local governmental body has a cause of action under 42 U.S.C. §1983."

Cawley, 753 F. Supp. at 130 (Citing *Van Meter v. Township of Maplewood*, 696 F. Supp. 1024, 1027 (D.N.J. 1988); *Alsar Technologies, Inc. v. Zoning Board of Adjustment*, 235 N.J. Super. L. 471, 563 A.2d 83, 91 (1989); and *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989)).

Furthermore, this Court has acknowledged the ability of Federal Government to preempt state laws in *City of New York v. FCC*, 486 U.S. 57 (1988). This Court stated as follows:

> When the Federal Government Acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes. The Supremacy Clause of the Constitution gives force to federal action of this kind by stating that the 'Laws of the United States which shall be in Pursuance' of the Constitution 'shall be supreme Law of the Land.' U.S. Const., Art. IV, cl. 2. The phrase 'Laws of the United States' encompasses both federal statutes themselves and *federal regulations that are properly adopted in accordance with statutory authorization*. For this reason, at the same time that our decisions have established a number of ways in which Congress can be understood to have pre-empted state law, see *Louisiana Public Service Comm'n. v. FCC*, 476 U.S. 355, 368-369 (1986), we have also recognized that 'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law. *Id.* at 369. (Emphasis added)
>
> *City of New York*, 486 U.S. at 63-64.

After suggesting that this is not a proper issue to be litigated in Federal Courts, Dearborn discusses the specific state remedy which it claims exists with regard to appeals of decisions from local zoning boards in the State of Michigan. It is noteworthy at the outset that this is only the second time which Dearborn has raised this argument. The first time was in its Petition for Rehearing *En Banc* to the Court of Appeals for the Sixth Circuit. These issues were not raised in its Motion for Summary Disposition in the District Court, at trial or in post-trial pleadings. Federal Court jurisdiction and exhaustion of state law remedies was not raised in briefs filed in the Sixth Circuit Court and was not discussed at oral argument. The issue therefore is not properly before this Court.

Dearborn in its Petition for *Writ of Certiorari* blends its argument regarding a specific state law remedy into its discussion of *Parratt v. Taylor,* 451 U.S. 527 (1981). Dearborn's very broad conclusion after its limited analysis of *Parratt* is that *Parratt* effectively bars causes of action under 42 U.S.C. §1983 where clear and comprehensive state law remedies exist. A careful review of *Parratt* establishes Dearborn's argument to be flawed.

First, the factual scenario under which this Court decided *Parratt* is far from similar to the instant action. *Parratt* involved an inmate at a Nebraska penal and correctional complex who had ordered certain hobby materials with a value of $23.50. Due to the negligence of employees at the prison, the hobby materials were lost. The inmate brought suit in Federal Court under 42 U.S.C. §1983 alleging jurisdiction under 28 U.S.C. §1343, which contains no minimum dollar limitation. The inmate's claimed deprivation under 42 U.S.C. §1983 was a Fourteenth Amendment claim for deprivation of property

without due process of law. *Parratt*, 451 U.S. at 529. In order to determine whether there was a deprivation of a constitutional right under §1983, this Court analyzed the inmate's Fourteenth Amendment due process claim. The conclusion of this Court with regard to the Fourteenth Amendment claim was as follows:

> Application of the principles recited above to this case leads us to conclude the respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment. Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established procedure. There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the state to provide a predeprivation hearing.
>
> *Parratt*, 451 U.S. at 543.

Thus, the 42 U.S.C. §1983 claim failed because the Court believed the inmate had not been deprived of any rights, privileges or immunities secured by the constitution or laws of the United States, a requirement to sustain a §1983 action. Dearborn's argument collapses the holding in *Parratt* to conclude that because there was an adequate state law remedy, the §1983 action was not available. The adequate state law remedy to redress the damages was part of the deprivation analysis under the due process claim under the Fourteenth Amendment. It is because there was no denial of due process that there was no deprivation to sustain a 42 U.S.C. §1983 claim. As such, Dearborn has erroneously suggested to this Court that *Parratt* is controlling in the instant action.

Dearborn next suggests to this Court that the Court of Appeals for the Sixth Circuit decision results in foreclosure of any ability of a municipality to create an ordinance with regard to satellite dish antennas. This is simply not the case. Restrictions are permissible, they just cannot unreasonably restrict or preclude reception, or impose cost burdens that are excessive in light of the cost of the installation itself. Within such limits, the municipality's health, safety and aesthetic concerns can and should be addressed. However, there must be flexibility on the part of the municipality. Blanket restrictions that dishes may not exceed twelve feet in height above grade are inflexible and unreasonable when reception would be entirely blocked by trees or buildings if the dish cannot be elevated above twelve feet. This is precisely what the Report and Order seeks to stop. As the *Loschiavo* District Court implied it is incumbent upon municipalities to draft ordinances which contain express provisions and guidelines for permissible alternatives for dishes on property where satellite lines are blocked. (Petitioner's Appendix E-5)

Finally, Dearborn, on the one hand, argues that it does not want to see a carte blanche for satellite antenna users, which it claims the FCC declined to provide in 47 C.F.R. §25.104, and then uses in support of its contentions statements taken out of context from Commissioner Mimi Weyforth Dawson's dissent in part from the Report and Order. It is clear that Dearborn did not completely read the dissent of Commissioner Dawson, as a complete reading clearly shows that Commissioner Dawson favored complete and total preemption of all local zoning ordinances with regard to satellite dish antennas. The following statements made by Commissioner Dawson in her dissent evidence her opinion of this issue:

> While I am sympathetic to localities' traditional role in use planning, this is not purely a local issue. It involves the right of individuals, as guaranteed by the First Amendment and the Communications Act, to receive interstate communications. As Senator Goldwater said in introducing S.R. 35, 'as a political conservative, I believe that each State possesses broad authority and responsibility on a wide range of subjects. However, the basic question here is not Federal preemption of local powers. It is whether cities and counties can thwart a clear national policy which has been repeatedly enunciated by the Congress and the FCC to encourage the development of new communications technologies and services in the public interest.' 31 Cong. Rec. 5357 (January 3, 1985, statement of Sen. Goldwater).

Preemption of Local Zoning, 51 Fed. Reg. at 5527. (Petitioner's Appendix F-14)

The Court of Appeals for the Sixth Circuit properly considered all necessary prongs under the 42 U.S.C. §1983 claim and properly reversed the District Court's findings with regard to same.

VI.

THE DECISION OF THE COURT OF APPEALS DOES NOT RADICALLY ENLARGE THE SCOPE OF 42 U.S.C. §1983.

Individuals have a cause of action under 42 U.S.C. §1983 when the conduct complained of was committed by a person acting under color of state law; and when the conduct deprived a person of rights, privileges or immunities secured by the constitution or the laws of the United States. 42 U.S.C. §1983. The first element is not at issue in this action. The second element is at the heart of

this case. The Court of Appeals for the Sixth Circuit properly relied upon *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990) in its analysis of the Report and Order under the §1983 test. The *Wilder* analysis has three elements, to-wit:

(1) Did congress intend that the subject provision benefit the Plaintiff;

(2) If so, does the provision create a binding obligation on the governmental unit rather than merely "congressional preference"; and

(3) Is the interest asserted sufficiently clear that it may be judicially enforced. (Quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989).

Wilder, 496 U.S. at 509.

The Report and Order was held to have created a federal right under the *Wilder* test by the Court of Appeals for the Sixth Circuit after full analysis of all three prongs. *Loschiavo*, 33 F.3d at 552-553. Dearborn's general policy argument is not strong enough to overcome the results reached under the *Wilder* test.

Dearborn also contends the Sixth Circuit's decision conflicts with other Sixth Circuit Opinions, including a 1978 case *Studen v. Beebe*, 588 F.2d 560 (6th Cir. 1978). Unfortunately, Dearborn mischaracterizes the holding in *Studen*. First, the factual basis for *Studen* involves a village ordinance which rezoned substantial acreage from a three-tiered zoning area into a single family residence use. The claims made by the land owner under 42 U.S.C. §1983 were based upon a denial of due process and equal protection. The Sixth Circuit held in agreement with the District Court that the land owner Appellants had failed to establish denial of due process, and thus they failed to

establish a denial of a federal right, privilege or immunity, and were therefore precluded from success on the §1983 action. The Loschiavos agree with *Studen* in that §1983 does not create a federal cause of action for every wrong committed under the color of state law. *Studen*, 588 F.2d at 566. However, in the instant case there is a cause of action under §1983 because all elements of the *Wilder* test have been met.

Furthermore, *Studen* is not applicable to the instant action, which is not a zoning dispute, but rather involves attempted enforcement of an ordinance which is preempted by the FCC because it differentiates between satellite reception antennas and other types of antennas, and does not meet the second prong of the mandatory two prong test. The federal right at issue here is the right to receive satellite signal communications by individual citizens through the use of satellite reception antennas. This right was introduced by Congress in its amendment to 47 U.S.C. §605 and the regulation thereafter adopted by the FCC to enforce the statutorily created policies and rights.

The *Studen* decision can best be summed up by the following:

> Litigants cannot create federal jurisdiction by filing an insubstantial action under the civil right statutes. *Burnett, supra*, 565 F.2d at 400. Only deprivations of rights, privileges, or immunities secured by the Constitution and the laws of the United States are actionable. *Ohio Inns, supra*, 542 F.2d at 679.
>
> . . . .
>
> The record in the present case reveals no deprivation of any rights, privileges or immunities secured by the Constitution or any laws of the United States.
>
> *Studen*, 588 F.2d at 566.

The Sixth Circuit Court of Appeals proper analysis of this issue led to a conclusion that there is a deprivation of a right secured by the laws of the United States, and as such a private right of action under 42 U.S.C. §1983 exists.

CONCLUSION

There is no conflict between the Sixth and Ninth Circuits as the Ninth Circuit did not address whether a private right of action under 42 U.S.C. §1983 exists to enforce rights under 47 C.F.R. §25.104. This writer has found no other circuit opinions discussing this issue.

Second, the Court of Appeals, after lengthy analysis under the *Wilder* test determined that 47 C.F.R. §25.104 created an enforceable right under 42 U.S.C. §1983.

Third, the Court of Appeals properly evaluated the reasonableness of the Dearborn Ordinance. It reviewed the factual findings of the District Court finding no error regarding the unreasonable limitations the Dearborn Ordinance placed on reception.

Fourth, the Court of Appeals properly determined that *Howard v. City of Burlingame*, 937 F.2d 1376 (9th Cir. 1991) dealing with FCC Regulation, PRB-1, was distinguishable and inapplicable to a 42 U.S.C. §1983 claim for impairment of the rights conferred under 47 C.F.R. §25.104.

Fifth, the instant action involves mandatory federal preemption under 47 C.F.R. §25.104 of state and local laws which discriminate against satellite reception antennas. This cause is within the jurisdiction of the Federal Courts under federal question jurisdiction. Further, available state law remedies need not be exhausted before a claim under 42 U.S.C. §1983 can be brought for deprivation of rights under 47 C.F.R. §25.104.

Lastly, the Court of Appeals did not radically enlarge or depart from the intent of 42 U.S.C. §1983 as they sustained the Loschiavos' claim under §1983 only after finding that all prongs of the *Wilder* test had been met.

For all of these reasons, it is requested that this Honorable Court deny Dearborn's Petition for *Writ of Certiorari*.

Respectfully submitted,

WILLIAMS, SCHAEFER, RUBY & WILLIAMS, P.C.

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Dated: January 9, 1995

No. 94-1040

In The

Supreme Court of the United States

October Term, 1994

CITY OF DEARBORN,

Petitioner,

vs.

RONALD LOSCHIAVO and
DONNA LOSCHIAVO, his wife,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

APPENDIX TO BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[CC Docket No. 85-87; FCC 86-28]

Common Carrier Services; Preemption of Local Zoning and Other Regulation of Receive-only Satellite Earth Stations

AGENCY: Federal Communications Commission.

ACTION: Report and Order.

SUMMARY: This action adopts a final rule stating Commission policy with respect to federal preemption of local regulation of satellite earth stations. This rule is necessary to ensure that non-federal regulations do not interfere unreasonably with the federal right to construct and use antennas to receive satellite delivered signals. Under this rule, non-federal regulations which differentiate in their treatment of satellite earth stations are preempted unless they have a valid health, safety or aesthetic objective and do not impose unreasonable limitations on reception. Regulation of transmitting antennas is similarly preempted except that non-federal health and safety regulation is not preempted.

EFFECTIVE DATE: March 14, 1986.

ADDRESS: Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTRACT:
Rosalee C. Gorman, (202) 634-1781.

SUPPLEMENTARY INFORMATION:

List of Subjects in 47 CFR Part 25

Communications common carriers, communications equipment, Radio, Satellites.

Report and Order

In the matter of Preemption of Local Zoning or other Regulation of Receive-Only Satellite Earth Stations (CC Docket No. 85-87).

Adopted: January 14, 1986.
Released: February 5, 1986.

By the Commission: Commissioner Dawson dissenting and issuing a statement.

I. Introduction

1. On March 28, 1985 the Commission issued a *Notice of Proposed Rulemaking (Notice)*[1] stating its initial determination to adopt a rule preempting certain state and local zoning or other regulations of satellite receive-only antennas.[2] We have received extensive comments on a wide variety of issues raised in connection with this

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[1] Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations, 50 FR 13966 (April 9, 1985).

[2] This action was taken in response to a Petition for Declaratory Ruling filed by United Satellite Communications, Inc. Because of the significant local interest in the issues involved and due to the limited record compiled, especially with respect to the views of local governments, we issued a Notice of Proposed Rulemaking soliciting further comments.

proceeding and are now in a position to adopt a final rule. The rule we are adopting is:

State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations

(a) Have a reasonable and clearly defined health, safety or aesthetic objective; and

(b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

Regulation of satellite transmitting antennas is preempted in the same manner except that state and local health and safety regulation is not preempted.

2. This rule differs from that originally proposed[3] reflecting modifications made in response to the comments submitted.[4] Due to the large number of documents

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[3] The proposed rule read as follows: "State and local zoning or other regulations that discriminate against satellite receive-only antennas in favor of other communications facilities are preempted unless they have a direct and tangible relationship to reasonable, valid, demonstrable and clearly articulated health, safety or aesthetic objectives and constitute the least restrictive method available to accomplish such objectives."

[4] Several parties have made specific alternative rule proposals. Although none of these suggestions has been adopted in full, aspects of these proposals have been adopted in full, aspects of these proposals have been incorporated in our final

filed in this matter,[5] we will not discuss each individually. However, all parties' suggestions have been fully considered.

3. In making our initial proposal, we determined that we had the legal authority to preempt[6] and that a limited preemption of state and local zoning regulation was warranted.[7] The objective of the *Notice* was to solicit comments on the implementation of such a preemption, recognizing our obligation to ensure that federal communications policies are not frustrated while also acknowledging the strong, non-federal interest in land use regulation.[8]

II. Comments

A. Authority to Preempt

4. Commenters in agreement with our decision to preempt analyzed precedent supporting such Commission action.[9] Preemption, according to proponents, is

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action. *See, e.g.*, Comments of RCA Communications, Inc. (RCA), Hughes Communications, Inc. (Hughes), and Satellite Television Industry Association, Inc. (Space).

[5] Approximately 170 comments were filed in this proceeding in addition to many informal letters indicating interest and over 2000 postcards supporting preemption. A list of the commenters is attached as Appendix A.

[6] *Notice* at paras. 9-21.

[7] *Id.* at para. 30.

[8] *Id.* at para. 17.

[9] *See e.g.*, Comments of Hughes, Space, Cable Com. Corp.

fully consistent with Commission policy, has been sustained in court challenges,[10] and is not limited to cases in which discrimination is found.[11]

5. Parties opposing preemption[12] argued that the federal interest in the availability of satellite-delivered service is insufficient to rebut the presumption of validity which attaches to local regulation of traditionally local matters.[13] The League stated that municipal regulation does not directly affect the availability of Commission licensed satellites. Where alternative methods to receive video entertainment programming exist, (i.e. cable television, direct broadcase [sic] satellites, multipoint distribution systems), a federal preemption allowing the unregulated proliferation of satellite antennas where no fee is paid for programming will hurt these other services by depriving them of revenue which will in turn hurt the satellite industry by affecting its financial base.[14] The

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[10] Comments of SPACE, Curtis Mathes Corp./Southern Satellite Systems, Inc./Spectrodyne, Inc. (Curtis Mathes), RCA.

[11] Comments of Brooks Satellite, Inc. at 4.

[12] At the suggestion of the National League of Cities (League), many cities stated objections to our proposed preemption. These were (1) the action is an improper federal interference in traditionally local matters; (2) the Commission does not have authority to preempt under the Communications Act; (3) local law provides adequate remedies; (4) preemption would impose unreasonable administrative burdens on states and localities. *See, e.g.*, Comments of Manhattan Beach, Ca.

[13] Space contends that this assertion is incorrect because the lawfulness of preemption action depends upon the impact local regulation has on federal objectives and not on the degree of local interest. Space comments at 6.

[14] League Comments at 5.

League argues that by eliminating local regulation the Commission may harm rather than advance its federal objective.

6. Section 705 of the Communications Act 47 U.S.C. 705, according to the League, creates only a limited "sanction" of reception of satellite delivered programming. Brooks Satellite, Inc. (Brooks), in contrast, calls section 705 rights "unequivocal" and "fundamental."[15] The League would limit the application of a case relied upon for preemption authority[16] on the basis of the "unique characteristics of MDS" where entry regulation was preempted because a reduction of reception points in one state placed a burden on interstate commerce.[17]

7. The McLean Citizens Association (McLean Citizens) stated that the cases relied on as precedent for Commission preemption were inapplicable because they involved state regulation of entry by new communications services. Comments filed by United States Satellite Broadcasting Co., Inc. (USSB), although favoring preemption, cautioned that the Commission must take care to respect the "legitimate land use concerns of state and

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[15] Comments of Brooks at 11.

[16] In the Matter of Orth-O-Vision, Inc., 69 FCC 2d 657 (1978), *aff'd sub nom.* New York State Commission on Cable Television v. FCC, 669 F.2d 58 (2d Cir. 1982) (Ortho-O-Vision). The League does not comment on our order in Earth Satellite Communications, Inc., 95 FCC 2d 1223 (1983), *aff'd sub nom.* New York State Commission on Cable Television v. FCC, 749 F. 2d 804 (D.C. Cir. 1964) (Earth Satellite) which preempted state regulation of SMATV systems where signals were delivered by satellite.

[17] League comments at para. 4.

local governments." USSB agreed with McLean Citizens that there is a distinction between federal preemption authority exercised under the Interstate Commerce Clause when the regulations are economic as opposed to based on state police powers. It stated that the Commission should try to harmonize its rule with legitimate zoning enactments[18]

8. The League also asserted that the record before the Commission does not establish the existence of a problem and that therefore Commission action is unjustified.[19] Other parties disagreed, offering examples of ordinances which would violate the proposed preemption rule, detailing individual problems with restrictive zoning, and citing cases in which a denial of an application to install an antenna was sustained by court action, thus preventing the reception of programming.[20]

9. A final objection by the League is that the Commission's preemption will result in a significant amount of litigation and necessitate review by either the Commission or the courts. Because the proposed rule's standards are vague, judicial review would result in inconsistencies

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[18] USSB cited Hybud Equipment Corp. v. Akron, 645 F.2d 1187, 1194 (6th Cir. 1961) in support of this proposition. The constitutional basis of the Communications Act is the Interstate Commerce Clause.

[19] League Comments at 11 quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977).

[20] Space comments at 5-8; USSB Comments at 1-3. Other parties' comments described particular difficulties that individual companies have encountered. *See, e.g.*, Comments of Atlantic Satellite, Spectradyne, American Satellite, District Broadcast Satellite Association, Curtis Mathes.

and agency review would impose extraordinary burdens on the Commission and on local authorities. Space replied that the adoption of a national standard would reduce litigation and encourage accommodation of disputes between antenna users and communities.[21]

B. Implementation of Rule

10. Most parties, whether in favor of, or opposed to, preemption, offered suggestions with respect to the scope of the specific rule to be adopted. Many believed that requirements of the rule were vague and unclear and stated that it did not offer sufficient guidance to local communities[22] or would not be susceptible to application in specific cases.[23]

11. Some commenters suggested that the "discrimination" requirement be stricter and invalidate any regulation that discriminates in effect as well as on its face.[24] Others asserted that the phrase "in favor of other communication facilities" be deleted because this created a harder burden for those challenging local action.[25] Several parties suggested deleting the entire discrimination

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[21] Reply Comments of Space at 8-9.

[22] Comments of American Planning Association (APA), Mutual Broadcasting System, Inc.

[23] Comments of National Satellite Cable Association and Hughes.

[24] Comments of USSB at 3.

[25] Comments of Equatorial Communication Services [Equatorial] and Associated Press.

requirement, stating that the proper focus of preemption should be on the effect of the local regulation on federal objectives and not on differences in treatment.[26]

12. It was also urged by opponents that we delete the "least restrictive means" test. They claimed that requiring the least restrictive alternative would prevent zoning for legitimate objectives such as historical preservation.[27] Space argued that the least restrictive means test was consistent with first amendment requirements where local regulations were restricting constitutionally protected communications.[28]

13. Several cities and representative groups stated that the proposed rule's general exception for ordinances enacted pursuant to police power objectives was duplicative as general zoning law requires that regulations be based on legitimate health, safety or, in some cases, aesthetic objectives.[29] They asserted that such a rule was thus unnecessary. Some preemption advocates also objected to this criterion because it would allow circumvention of the discrimination requirement by creating multiple

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[26] Comments of Curtis Mathes, Cablecom and Hughes, *Contra*, Comments of M/A Com and Equatorial urging that a clear stand be taken against discrimination.

[27] Comments of National Trust for Historic Preservation. *See also* Comments of National Capital Planning Association.

[28] Comments of Space at 12-15.

[29] *See* Comments of APA. *See also* Reply Comments of Space at 13. Comments of the National Capital Planning Commission at 7 requested the inclusion of "security" as a criteria but did not elaborate.

loopholes.[30] SPACE asked that any aesthetic zoning power be limited to "bona fide historic districts" that also restrict other "accoutrement or modern living."[31] American Satellite suggested that any health hazard relied upon by local authorities be required to be documented.[32]

14. Some commenters suggested preemption guidelines based on size and land use characteristics of the proposed antenna site. For example, the International Association of Satellite Users and Suppliers [IASUS] proposed an absolute preemption for construction in industrial, commercial and high density areas as well as for antennas of less than 3.5 meters with a limited preemption allowing non-aesthetically based regulation of antennas over 3.5 meters in low density single family zones.[33]

C. *Alternative Approaches*

15. The APA asserts that the Commission should avoid the vagueness of the proposed rule by exercising preemption on a case-by-case basis and only in those

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[30] Comments of International Association of Satellite Users and Suppliers at 6.

[31] Comments of Space at 17. Cable Com. Corp. at 7 suggested eliminating aesthetics as an acceptable local objective.

[32] Comments of American Satellite at 1.

[33] *See also* Comments of M/A Com. Brooks, USSB, Sat Time Inc., Direct Broadcast Satellite Association (DBSA) and National Association of Broadcasters (NAB) with respect to suggested size criteria. *Cf.* Comments of Contemporary Communications Corp. which cautioned against emphasis on size or physical characteristics of antennas.

instances where one communications technology is favored over another. Although acknowledging that the Commission's administrative burden might be increased under this approach, the APA maintained that there would only be a few cases of egregious discrimination necessitating review.[34]

16. Many parties supporting preemption action urged that any final rules be extended to transmitting as well as receiving antennas despite our tentative decision to limit consideration to the latter.[35] The rationale offered for this suggestion is that many smaller transmitting antennas are not visually or otherwise different from receive-only facilities and thus should not be subject to discriminatory local regulation.[36] These commenters [sic] argue that the record established in this proceedings is sufficient to justify Commission action with respect to transmitting antennas.[37] It was also suggested that the

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[34] Comments of APA at 9. Many cities agreed with APA's recommended approach. *See e.g.* Cincinnati, Ohio; Tuscaloosa, Ala; Warwick, R.I. *See also* Comments of David Preece.

[35] *See e.g.*, Comments of Equatorial; Hughes; IASUS; RCA; Public Broadcasting Service (PBS); Satellite Business Systems (SBS); M/A Com; Atlantic Satellite; Sat Time, Inc. *See also* Comments of Contemporary Communications Corp. which urged extension to all telecommunications antennas.

[36] Comments of PBS. *See also* Comments of RCA which suggest a presumption against local regulation of antennas under 2 meters in order to encourage construction of small antenna business networks to operate in the 12/14 GHz frequency bands.

[37] *See* Reply Comments of PBS.

Commission, by establishing the ANSI standards for regulation of radiation levels of transmitting equipment, has already preempted local control for health objectives.[38]

17. Other parties asserted that because we had stated a tentative conclusion to limit the rule under consideration to receive-only antennas, a new rulemaking might have to be established to consider preemption of local regulation of transmit antennas.[39]

18. Parties on both sides of the issue requested that in addition to, or instead of, a general rule, we should give examples of those ordinances or regulations that would be acceptable under our preemption standards.[40] Space, however, cautioned that such an approach was inadvisable because in limiting our rule with such examples, a wide variety of "local abuses" would not be properly addressed.[41]

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[38] *See* Comments of Atlantic Satellite citing LIMA Partners vs. Northvale, Docket No. L-17049-84 P.W. (Superior Court of New Jersey, Law Division, Bergen County, May 10, 1985) where a state court reached this conclusion.

[39] *See* Comments of NAB, Atlantic Satellite has filed a petition requesting the establishment of a separate rulemaking to consider preemption of local regulation of satellite transmitting antennas. RM-5021.

[40] *See* Comments of National Capital Planning Association at 8; Curtis Mathes at 5.

[41] Comments of Space at 13.

D. Other Issues

19. The League suggested that our preemption action would violate both the National Environmental Policy Act (NEPA) and the Regulatory Flexibility Act.[42] With respect to the former, it stated that under NEPA standards, the Commission is obligated to consider the authorization of an antenna over 30 feet in diameter or those to be built in an historic or scenic area a major action requiring an environmental impact statement.[43] The League contended that a similar approach is required in adopting a final preemption rule. Space, however, states that because the Commission is not authorizing any construction here and because the receive-only antennas under consideration are not required to be licensed, there is no inconsistency with NEPA. In addition, receive-only antennas usually do not approach thirty feet in height or diameter and therefore even if this rulemaking were an NEPA defined "action," no environmental policies have been implicated.[44]

20. The League also asserts that the *Notice* did not comply with the Regulatory Flexibility Act.[45] According to the League, we did not consider alternative approaches

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[42] 42 U.S.C. 4321 *et seq.*; 5 U.S.C. 601 *et seq.*

[43] Comments of League at 17.

[44] Reply Comments of Space.

[45] Comments of League at 18. We are considering this issue raised by the League's comments despite the fact that it failed to submit separate comments directed to our initial Regulatory Flexibility Analysis as required by paragraph 34 of our *Notice*.

such as exempting small cities from preemption or allowing any compliance with our rules to be voluntary. Space disagreed, asserting that any exemption for small jurisdictions would circumvent Commission objectives in proposing a uniform regulatory policy. In addition, the rule would not impose any new record keeping or other additional administrative filing requirements on small cities, a determination which was made in our Initial Regulatory Flexibility Statement.

21. The National Trust for Historic Preservation (Trust) stated that the Commission illegally ignored the provisions of the National Historic Preservation Act by failing to consult with the Trust prior to enacting any rule. In addition, the Trust asserted that because historic preservation is also a federal objective, preemption is not authorized.

22. Both the District of Columbia and the National Capital Planning Association asserted that because zoning regulation in the District is promulgated under federal auspices, the Commission cannot preempt these regulations.

III. Discussion

A. Preemption

23. In our *Notice* we concluded that we had the authority to preempt non-federal regulations which stood as obstacles to the accomplishment of federal objectives. We determined that the broad mandate of Section 1 of the Communications Act, 47 U.S.C. 151, to make communications services available to all people of the United States

and the numerous powers granted by Title III of the Act with respect to the establishment of a unified communications system[46] establish the existence of a congressional objective in this area. More specifically, the recent amendment to the Communications Act, 47 U.S.C. 705, creates certain rights to receive unscrambled and unmarketed satellite signals.[47] These statutory provisions establish a federal interest in assuring that the right to construct and use antennas to receive satellite delivered signals is not unreasonably restricted by local regulation.

24. As stated in our *Notice*,[48] when "state regulation stands as an obstacle to the accomplishment of a congressional purpose," such regulation is subject preemption.[49] Our conclusion was that the record showed local and state regulatory interference with established federal objectives and thus some of [sic] preemption was warranted.

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[46] Earth Satellite Communications, Inc., note 16. *supra, citing* General Telephone Co. of California v. FCC, 413 F.2d 390, 396, 401 (D.C. Cir. 1969).

[47] The state court cases cited by the League at pp. 9-10 of its comments for the proposition that the Communications Act does not authorize preemption of zoning involve [sic] questions with respect to height limitations on amateur radio facilities. In this proceeding, we are not preempting reasonable, nondiscriminatory local restrictions. In addition these cases do not involve section 705 rights.

[48] *Notice* at para. 9.

[49] Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984). *See also* Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board, 104 S. Ct. 2518 (1984); Florida Avocado Growers v. Paul, 373 U.S. 132 (1963); Hines v. Davidowitz, 312 U.S. 52 (1941).

25. The comments submitted in this proceeding do not support a contrary conclusion and thus our final rule will implement a limited preemption. The arguments offered by commenters opposed to preemption state that a federal objective has not been established because other means of obtaining video programming are available and that a preemption in this proceeding would harm other services.[50] This position ignores the clear statement in our *Notice* that we will not permit a state to arbitrarily favor one particular communications service over another and that local ordinances which engage in arbitrary discrimination will be preempted. The existence of alternative communications media is not a sufficient justification for discriminatory local regulations. In many cases, satellites deliver a wider range of programming than that available over other media such as cable television systems or MDS. Thus, local regulation may deprive local residents of access to the broader range of choices available to antenna users in other parts of the country. In addition, this Commission repeatedly has emphasized its policies to maximize consumer choices by developing a competitive marketplace for the provision of telecommunications goods and services.[51]

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[50] The League claims that cable television systems are the primary method of delivering video programming and that existence of a dual federal-local regulatory scheme for that service precludes preemption action with respect to satellite antennas.

[51] *See e.g.*, Policy and Rules Concerning rates for Competitive Common Carrier Service and Facilities Authorizations Therefore, 95 FCC 2d 554 (1983).

26. If individuals cannot use antennas to receive satellite delivered signals because of discrimination or excessive state and local regulation, their right of access as established by section 705 to interstate communications delivered by satellite will be useless.[52] Whether the use of satellite antennas will cause economic harm to other communications industries is not a proper basis for local regulations that effectively deny citizens direct access to satellites. Such regulations would frustrate our competitive regulatory policies which have been promulgated to provide for a variety of services by consumers. It would be contrary to those policies to permit discriminatory local regulation which reduces the range of choice.

27. The League and most commenting cities[53] have emphasized the traditionally local nature of zoning regulations. We recognized this concern in our *Notice*[54] and it was this factor which resulted in our original conclusion to propose a limited preemption. Despite this recognition, it must be emphasized that the relative importance to states or local jurisdictions of their own laws is not the proper focus in a decision to preempt.[55] The Supreme Court has recently held that a local transit authority was required to comply with the federal minimum wage and

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[52] *See Notice* at para. 10.

[53] *See, e.g.*, Comments of Mankato, Minn.; Aurora, Colo.; Delaware County Planning Dept.

[54] *Notice* at para. 15. *See also* Columbia Plaza Ltd. Partnership v. Cowles, 403 F.Supp. 1337 (D. D.C. 1975).

[55] Free v. Bland, 369 U.S. 663, 686 (1962). *See also* Fidelity Federal Savings and Loan Assoc. v. De La Cuesta, 458 U.S. 141, 153 (1982).

overtime requirements. The transit authority claimed it was immune from federal regulation when operating in areas of traditional local government functions. The court held that "a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional' " is unworkable.[56] The same principle applies in this case in that it cannot be argued that preemption is automatically precluded merely because zoning has been called a traditionally local matter.

28. Other parties have questioned our reliance on prior Commission actions that have preempted state regulation of MDS and SMATV systems[57] pointing out that these cases involved non-federal economic regulations and not those promulgated under states' police powers such as zoning.[58] An analysis of cases cited which address this issue, however, demonstrates that the question of preemption authorized under the Interstate Commerce Clause is not dependent on whether the regulation at issue is economic but on whether its effect on interstate commerce is more than "incidental."[59] In this proceeding,

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[56] Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005, 1016 (1985).

[57] Orth-O-Vision, *supra* note 16; Earth Satellite, *supra* note 16. *See* Canton Township v. Brenner, No. 86 CT3551 (35th Dist. Ct. Plymouth, Michigan September 26, 1985) at 10 where the Court stated that the Commission in its Earth Satellite order has already preempted local zoning regulation "to a significant extent."

[58] Comments on McLean Citizens.

[59] Hybud Equipment Corp. v. Akron, 654 F.2d 1187, 1194 (6th Cir. 1981) *citing* Hughes v. Oklahoma 441 U.S. 322 (1979).

the communications delivered by satellite are unquestionably interstate in nature and, as we found in the *Notice*, denial or reasonable access to antenna facilities significantly, not incidentally, interferes with individual rights to receive such communications.

29. An additional contention raised by commenters opposed to preemption is that the existence of a problem has not been sufficiently established to warrant action. However, the volume of comments submitted which detail significant problems with local zoning encountered by antenna users leads to a contrary conclusion.[60] In addition, the existence of cases in which an antenna user was able to obtain a favorable court result is insufficient evidence upon which to base a conclusion that a rule is unnecessary, especially when other cases to the contrary exist.[61] Whether a judicial remedy might be available in some cases and to those who can afford litigation is not determinative of our ability or of the necessity to preempt state regulations when they are obstructing federal objectives.

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[60] *See e.g.*, Comments of Space discussing ordinances of Baltimore, Md., and Gaithersburg, Md. *See also* note 20, *supra*.

[61] For a favorable result, *see* Morgan v. Coral Gables, #83-42783 C.S. 22 (Cir. Ct. Fla. June 18, 1984); Canton v. Brenner, No. 85 CT 3551. For a contrary result, *see* Minars v. Rose, #13686/84. (Special Team, Nassau Co., NY, March 25, 1985); Gouge v. Snellville, 287 S.E.2d 539 (Sup. Ct. Ga. 1982). *See also* Reply Comments of Space at 7-8.

B. Final Rule

30. Most commenters urged that we make adjustments to our final rule that would clarify its requirements and offer more effective guidance to local communities.[62] In formulating the rule adopted here, we have taken into consideration the criticism of our original proposal and to the extent possible in a general policy statement, have made our standard clearer and easier to apply to specific situations.

31. We have retained the criterion that a preemptible regulation must differentiate but have modified the rule to apply only to antenna facilities. This change is based on our conclusion that to require comparable treatment for antennas and cable systems would be unworkable in light of their distinct technologies.[63] This action is not a retreat from our condemnation of ordinances such as that of Chicago which prompted the petition initiating this rulemaking.[64] The Chicago ordinance imposed its

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[62] We adopt USSB's suggestion that our preemption apply to all non-federal action including ordinances, statutes and regulations. In addition, we have received comments filed by Max Dean Parsons which urge extension of preemption to private restrictions such as those found in deed convenants. This issue was not raised in our *Notice* and raises some issues not presented in a consideration of local governmental action. We decline to rule on it in this proceeding and deny the request.

[63] *See* Comments of Hughes which indicate that construction approval requirements may differ for small satellite antennas and inner-city cable construction.

[64] *See Notice* at paras. 17-21. Any ordinance enacted solely for the purpose of giving economic protection to a cable system might be invalid under state law. *See* Comments of League at 12

stringent procedural requirements only on applications for satellite antennas and thus would differentiate in the treatment of other antenna facilities. This ordinance would be subject to preemption under our final rule because it would not comply with paragraphs (a) and (b).

32. Non-federal regulations may impose, under our adopted rule, reasonable requirements on all antennas as long as these local standards are uniformly applied and do not single out satellite receive-only facilities for different treatment.[65] An ordinance attempting to regulate all antennas by enacting restrictions on those of a certain shape, for example a ban on all spherical antennas, would differentiate between satellite antennas and other types of facilities and therefore would be preempted under our rule. Communities wishing to preserve their historic character may limit the construction of "modern accoutrements" provided that such limitations affect all fixed external antennas in the same manner.[66] In adopting this rule we intend that it be a valid accommodation of local interests as well as of two federal interests, namely

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which cites 8 McQuillin. The Law of Municipal Corporation, Sec. 25.61 at 161 (3d. ed. 1971) for the proposition that zoning ordinances must be equal in operation and effect.

[65] Some Commenters claim that the impact on interstate commerce and not discriminatory treatment is the proper focus of a preemption action. *See, e.g.*, Comments of Curtis Mathes and Hughes. It is precisely our concern that states are impermissibly burdening interstate satellite service that leads us to issue this preemption.

[66] *See* Comments of National Trust, National Capital Planning Association, Space.

promoting interstate communications and historic preservation.[67] Communities which are truly concerned with preserving their unique historic character may do so if they do not discriminate against satellite receive-only antennas.

33. If a community chooses to enact an ordinance which differentiates in its treatment of different types of antennas, it must bear a high burden. Our objective is to ensure that satellite receiving antennas are not treated less favorably than other antenna devices such as Amateur Radio antennas and Satellite Master Antenna Systems (SMATVs).[68] A community must demonstrate that

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[67] The National Trust states that sections 106 & 110 of the National Historic Preservation Act, 16 U.S.C. 470 *et seq.*, requires us to consult with them prior to rulemaking. Even if the assertion is correct, the National Trust had full opportunity to comment and its comments have been considered in formulating the final rule.

[68] *See, e.g.*, Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 50 Fed. Reg. 38813 (September 25, 1985) where we stated: "State and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted." *See also* Earth Satellite Communications, Inc., *supra* note 16, where we stated: "we do not wish to preclude a state or locality from exercising jurisdiction over certain elements of an SMATV operation that properly may fall within its authority, such as zoning or public safety and health, provided the regulation in question is not undertaken as a pretext for the actual purpose of frustrating achievement of the preeminent federal objective and so long as the nonfederal regulation is applied in a nondiscriminatory manner. Local authority over such concerns must be exercised so that a local jurisdiction in fact does not inhibit or interfere with the delivery of interstate signals through the exercise of its authority."

its regulation meets both paragraphs (a) and (b) of our rule. With respect to paragraph (a), we agree with the commenters who said that our original proposal should be recast to reduce undefined and vague terms.[69] The rule has been revised in an effort to respond to that criticism, but any general policy formulation will have aspects subject to varying interpretations.

34. We have retained the use of health, safety and aesthetic objectives[70] but have merely required these to be "reasonable" and "clearly defined." These terms are readily susceptible to application by local authorities and give some flexibility in the application of local regulations to individual locations.[71] To be more specific in a general national policy statement would be inadvisable.[72] In addition, requiring local authorities to justify a differentiation in treatment will help ensure that local zoning power is not used to restrict unreasonably the installation of satellite receive-only antennas.

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[69] Such terms as "valid", "clearly demonstrable" and "direct and tangible relationship" were in this category. *See* comments of National Satellite Cable Association.

[70] We find that the National Capital Planning, Association's suggestion to include "security" as a criteria has no relevance to the issues raised here as national security issues relating to communications are subject to federal, not state, jurisdiction.

[71] It was such flexibility that many cities insisted was necessary if they were to exercise legitimate zoning powers. *See* Comments of David J. Preese; League at 7.

[72] For example, we cannot say that the requirements of 10 as opposed to 5 bushes of a certain kind or size for screening of satellite antennas is unreasonable without becoming involved as a national zoning arbitrator, a result we sought to avoid in our *Notice*.

35. Although many commenters have argued that all aesthetic regulation should be preempted,[73] or severely restricted,[74] under prevailing law, aesthetics are permissible regulatory objectives. The preservation of such community values has been sustained even in light of first amendment challenges. Thus, any preemption which failed to recognize this strong local interest would not be sound.[75]

36. In addition to defining the reasonable objective of an ordinance which differentiates in its treatment of antennas, a community is limited in the types of restrictions it can apply. It cannot unreasonably limit or prevent reception by requiring, for example, that a receive-only antenna be screened so that line of sight[76] is obscured. Moreover, an ordinance which discriminates cannot

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[73] *See* Comments of Curtis Mathes.

[74] *See* Comments of Space.

[75] *See Notice* at n. 21 and cases cited there where we noted the Supreme Court's requirements of careful scrutiny of local aesthetic regulations which involve first amendment considerations. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). *See also* Canton v. Brenner, No. 85 CT 3551. L.I.M.A. Partners v. Borough of Northvale, Doc. No. 17049-84(PW) (May 10, 1985). Because we are relying on our statutory authority under the Communications Act as a basis for preemption, we are not reaching first amendment issue raised in connection with the proceeding.

[76] A receive-only antenna must have an unobstructed line of sight to a satellite in order to receive signals. It has been asserted by SPACE that cities, in enacting zoning ordinances, were sometimes unaware of the technical requirements for reception. Reply Comment at 4.

impose size restrictions only on receive-only antennas which would effectively preclude reception.[77]

37. As a further standard we are requiring that any local restriction which fails to meet our discrimination tests must not impose costs which are excessive in light of the costs of the equipment. Again, in a general policy statement, it is inadvisable to specify what "excessive" would mean in a particular situation but we are confident that local authorities who are familiar with local situations will be capable of making accurate distinctions.[78] If antenna users are not satisfied with the results of local determinations, it would be within the ability of a court to make legal determinations of reasonableness or excessiveness.

38. The requirements of paragraph (b) are more specific and more easily applied than our original "less restrictive means" test. We agree with some commenters that the proposed requirement would be difficult to apply and might lead to unintended results.[79]

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[77] Under current technology, an antenna must be at least 8 to 12 feet in diameter to adequately receive video signals transmitted by satellite. Space Reply Comments at 15 n. 7. Antenna size for Direct Broadcasting Service reception can be much smaller but that service has not as yet been instituted.

[78] This is the type of flexibility that cities have said they need to effectively enforce their zoning power. *See* Comments of Midland, Mich.; Pinellas Park, Fla.; Carmel by the Sea, Ca.; Connecticut Siting Council. Examples of excessive costs might be high filing fees or unreasonable hearing requirements.

[79] *See, e.g.*, Comments of Trust at 2.

C. Alternatives

39. It has been suggested that instead of adopting a general policy statement, we should review specific zoning cases to determine if preemption is warranted in individual situations.[80] We rejected this approach in our *Notice* and disagree with the APA and others that the administrative burden created by case-by-case review will be minimal. Initially, as we stated in the *Notice*, we do not intend to operate as a national zoning board. Those cities commenting have consistently indicated their opposition to Commission involvement in local disputes and such individual review will increase rather than decrease a national presence. By issuing a rule, we expect that local authorities will conform their regulations to our standards and that they will make determinations which are in the best interests of their communities that reflect federal policy. Commission intervention in individual cases as a general policy will not further this objective.

40. We also disagree with the suggestion that if we impose a stringent threshold discrimination test, we need not adopt a general rule and could minimize the extent of Commission involvement in a policy which would instead require case-by-case review.[81] There has been increased interest and publicity surrounding this issue and we conclude that the large number of cases which might be presented for individual review would place a severe burden on our administrative process. Satellite

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[80] *See* para. 14 *supra*.

[81] Our preemption is broader than that suggested by APA by requiring that discriminatory ordinances be justified.

antenna users who are dissatisfied with the results of any local zoning decision can use the standards adopted here in pursuing any legal remedies they might have.[82] In addition, we would entertain requests for further action if it appears that local authorities are generally failing to abide by our standards.[83] Any party requesting Commission review of a controversy will be expected to show that other remedies have been exhausted.

41. Many of the comments submitted urge us to include transmitting antennas in our preemption. Transmitting equipment, while visually similar to receive-only earth stations, does raise regulatory issues with respect to health and safety because of the emission of radio frequency radiation (RF radiation). This Commission has declined to preempt state or local RF radiation standards but has reserved this issue if it is brought to our attention that such standards are "adversely affecting a licensee's ability to engage in Commission authorized activities."[84] On the record before us, it would be premature to preempt health or safety standards, especially where our *Notice* indicated that issues with respect to transmitting equipment would be excluded.[85]

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[82] As Hughes observes "the preemption standard is intended to be operational, and enforceable by private parties, without further involvement of the agency." Comments at 8.

[83] *See* Comments of USSB.

[84] Responsibility of the Federal Communications Commission to Consider Biological Effects of Radio Frequency Radiation when Authorizing the Use of Radio-Frequency Devices, FCC 85-90 (released March 14, 1985) at para. 43.

[85] *Notice* at para. 27.

42. However, we see no similar impediment to the preemption of discriminatory, non-justified aesthetic regulation of transmitting antennas. There are no significant differences in the visual appearance of transmit and receive-only facilities and the same federal interest exists with respect to local restriction of access to satellite services. Thus, if a state or local regulation based on aesthetics differentiates between satellite transmitting antennas and other types of antennas, it is preempted as described in the rule adopted herein unless it has a reasonable aesthetic purpose and does not operate to unreasonably restrict or prevent transmission. At this time, we are reserving the issue of preemption based on the health and safety aspect of RF radiation for consideration in a separate proceeding.[86] In taking this action, however, we are not preempting non-federal authority distinctions based on land use criteria such as those designating certain areas for residential, commercial or other uses.

43. We decline to attach a list of acceptable sample zoning ordinances. As has been repeatedly stated here, our preemption is intended to afford local communities some flexibility. Sample laws would curtail this flexibility. Moreover, a list of specific rules would be incomplete and could lead to circumvention of our objectives.[87]

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[86] The rulemaking requested in RM-5021 specifically addresses this issue. *See* note 39, *supra*.

[87] Comments of SPACE at 14.

D. Other Issues

44. We agree with Space that our rulemaking does not violate either the National Environmental Policy Act or the Regulatory Flexibility Act. We are not authorizing the construction of any antenna facilities in this proceeding but merely are stating guidelines for local authorities. Thus, the NEPA regulations with respect to "major actions" do not apply. Because we are adopting a policy which will ultimately be reflected in individual local regulations including those based on aesthetics, we are taking no action in this proceeding which significantly affects the "quality of the human environment."[88]

45. In our *Notice*, pursuant to section 603 of the Regulatory Flexibility Act, we stated that our rule would have a beneficial effect on local governments by affording guidance as to acceptable limits of governmental action. We adhere to this conclusion in adopting a final rule. Our objective in this proceeding is to avoid inconsistent local regulations which unreasonably restrict interstate communications. Any exemptions for small communities such as suggested by the League would certainly frustrate this objective. Our policies must be applied by all local jurisdictions and the commenters have not demonstrated why smaller communities should not be subject to our rule.

46. It has been argued by the District of Columbia and by the National Capital Planning Association that zoning ordinances in the District of Columbia cannot be

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[88] *See* 47 CFR 1.1301.

preempted because they are promulgated under federal authority. However, it has been held that this factor is not of decisional significance in a federal preemption action.[89] With respect to federally controlled locations, it is presumed that federal authorities will follow the policy adopted here.

IV. Conclusion

47. Accordingly, pursuant to sections 151, 303, 403 and 705 of the Communications Act, it is ordered that Part 25 of Chapter I of Title 47 of the Code of Federal Regulations is amended as set forth in Appendix B, effective March 14, 1986.

48. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 604, we make the following determination. The policy adopted herein is intended to preempt local regulations which are interfering with the federal objective of promoting interstate satellite delivered communications. Local governments of all sizes would be affected by our rule. In addition, small businesses selling receive-only antennas would possibly be benefited by an enhanced competitive market. The National League of Cities has objected stating that we have not considered as an alternative the exemption of small governments from the

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[89] Columbia Plaza Limited Partnership v. Cowles, 403 F.Supp. 1337, 1341 n. 11 (Dist. Ct. D.C. 1975). In this case, the court found that the fact that the District of Columbia's rent control program was established pursuant to a federal enabling statute did not by itself indicate a congressional intent that the area of regulation should not be preempted.

rule's operation. We conclude that any such exemption would result in undesirable inconsistencies which might impede the distribution of interstate communications. There are no effective alternatives.

49. It is further ordered that the Secretary shall cause this Report and Order to be published in the **Federal Register.**

50. It is further ordered that the Petition for Declaratory Ruling filed by United Satellite Communications, Inc. is granted in part and denied in part as set forth above.

51. It is further ordered that the proceedings in CC Docket No. 85-87 are terminated.

Federal Communications Commission.

William J. Tricarico,

Secretary.